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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

JOSE ANTONIO MARTINEZ,

Defendant and Appellant.

H031192

(Santa Clara County
Super.Ct.No. CC584680)

A jury convicted Jose Antonio Martinez, the defendant herein, of the second degree murder (Pen. Code, § 187)¹ of Cesar Sanchez. The jury found true an allegation that defendant personally used a firearm in the commission of the offense. (§ 12022.53, subd. (d).) The district attorney had alleged that defendant committed the crime to benefit a street gang (§ 186.22, subd. (b)(1)(C)), but the jury returned no finding on that allegation and the trial court dismissed it on the prosecution's motion.

Following victim-impact statements by two members of Sanchez's family and a victim advocate who knew Sanchez, the trial court sentenced defendant to 40 years to life in state prison.

¹ All statutory references are to the Penal Code unless otherwise indicated.

This court affirmed the judgment in an opinion we filed in 2008. The California Supreme Court granted defendant's petition for review and deferred action pending its disposition of *People v. Chun* (2009) 45 Cal.4th 1172. On June 10, 2009, after it handed down its decision in *Chun*, the California Supreme Court transferred this case to us with directions to vacate our decision and to reconsider the cause in light of *Chun*. We have received supplemental briefs from the parties addressing *Chun*'s applicability to this case.

Finding, as we did before, no prejudicial error or prejudicial prosecution misconduct, we will affirm the judgment.

FACTS AND PROCEDURAL BACKGROUND

Defendant was 16 years old on March 7, 2005, when he murdered Sanchez, who was married and 22 years old. Defendant was a member of the Varrio Horse Shoe set of the Norteño street gang with a violent history despite his young age. Sanchez was a member of the East Side Clantone or Clanton set of the Sureño street gang.

I. *Prosecution Case*

The prosecution's theory of the case was that defendant murdered Sanchez because they belonged to opposing gangs and Sanchez refused to be intimidated by a challenge defendant made to him. In support of that theory, the prosecution posited three possible scenarios. Defendant committed the murder by either shooting Sanchez execution-style at close range (the express malice theory), killing him in the course of committing a highly dangerous act with conscious disregard for human life (the implied malice theory), or killing him in the course of firing a number of gunshots in the direction of the inhabited dwelling belonging to Sanchez (the second degree felony-murder theory).

Marcelino Carranza testified that he saw defendant shoot Sanchez. Carranza and defendant were walking down the sidewalk fronting Sanchez's house on the evening of March 7, 2005. Sanchez was standing on his porch, smoking a cigarette. Defendant knew that Sanchez was a Sureño because moments beforehand someone had commented

that Sanchez's house was occupied by *scrapas*, i.e., scraps, a derogatory term that Norteños use to refer to Sureños.² Defendant asked Sanchez for a cigarette in a hostile and challenging manner. Sanchez descended from the porch, stood near defendant at the house's front gate, and rebuffed defendant in vulgar terms, telling him he didn't have any cigarettes to share with him. Defendant responded by insulting Sanchez and shooting him with a handgun. Carranza saw the muzzle flash of the first gunshot and heard several more gunshots as Carranza began to run away from the scene.

There was other evidence identifying defendant as the killer. Juan Torres, the victim's brother-in-law, who along with Mario Torres was inside the house belonging to the victim and the victim's wife, Carmen Torres, testified that he saw the hand of an individual wearing a 49ers football team jersey discharge a gun in the direction of the house. Juan Torres heard a number of gunshots, ran outside, and found Sanchez lying on the porch and bleeding.

Carmen Torres, Sanchez's wife, was inside the house when she saw two men approach her husband, who was standing on their porch. One was wearing a red and white football jersey bearing a number she perceived to be 08. Carmen Torres then heard several gunshots, went out onto the porch, and found her fatally wounded husband lying there with a head wound.

Mario Torres, another brother-in-law of the victim, was standing behind the closed front door of the house and saw that the shooter was wearing a red jersey. He, too, then found Sanchez bleeding on the porch. Torres perceived that defendant was intentionally

² A San Jose police officer testified that to Norteños "a scrap is just a derogatory term for someone that they consider a [Sureño] or a Mexican from Mexico They consider them like a scrap, like they're below the English-speaking . . . Chicano Norteño gang members." (See *People v. Zarazua* (2008) 162 Cal.App.4th 1348, 1351.)

shooting at him as he stood behind the house's closed front door and watched the shooter from one of the door's three separate small windows.

Various witnesses, including Carranza, testified that on the day of Sanchez's murder defendant was wearing a red and white San Francisco 49ers football team jersey; some saw that the jersey bore the number 80 (the number belonging to the storied 49ers wide receiver Jerry Rice) or a similar number. The parties stipulated that another witness, defendant's sister-in-law, would have testified, if she had appeared in court, that defendant came home in the evening on the day of the murder. His face was sweaty and he was wearing a red jersey bearing the number eight or 80 in white characters on both sides. During their investigation of the murder, the police recovered a Jerry Rice (as noted, Rice's uniform number was 80) 49ers team jersey from defendant's house on Auzerais Street in San Jose. A criminalist located one particle containing lead and barium on the jersey and opined that the particle probably comprised gunshot residue.

Alejandro Mariscal testified that after the shooting defendant said he had "dump[ed]" on the victim, which Mariscal understood to mean defendant had shot him.

Another Norteño gang member, Francisco Carrillo, a good friend of defendant, was wearing a red San Jose Sharks hockey team jersey that evening. Carrillo, however, had left the area minutes before the shooting occurred and had just arrived at his nearby home when he heard gunshots, evidently those that killed Sanchez.

Before the shooting, defendant showed Mariscal a .357 revolver loaded with four bullets. A criminalist testified that the bullets recovered from the crime scene could have been fired from that type of handgun.

A forensic pathologist who conducted an autopsy on Sanchez testified that he had two distinct gunshot wounds and a fragmentation injury. He had been shot in the head and arm. There was no testimony about the distance from which defendant inflicted the head wound. The pathologist testified, however, that the arm wound was inflicted from no farther than three feet away, as shown by stippling on Sanchez's arm. It was

impossible to tell whether Sanchez was shot first in the head or the arm. The pathologist explained that, for example, “he could have been shot in the arm as a non-fatal injury and then shot in the head after.” Because there was no stippling associated with the head wound, that wound must have been inflicted from a distance greater than three feet, unless some intermediate barrier had blocked stippling from occurring.

II. *Defense Case*

The defense theory was that Carrillo murdered Sanchez.

Carrillo had ties to both the Varrio Horse Shoe set of the Norteño street gang and a different Norteño gang set, the San Jose Unidos. His best friend was Mariscal, a fellow Norteño and current or former San Jose Unidos member; the Unidos were friendly with the Varrio Horse Shoe set. Sanchez had once tried to assault Mariscal. After the shooting, a neighborhood visitor and a neighborhood resident both heard a woman scream “Francisco,” a name identical to Carrillo’s first name. As noted, Carrillo was wearing a red San Jose Sharks hockey team jersey on the day of the shooting. On the night of the shooting, Mario Torres told police the shooter was wearing a red Sharks jersey. At trial, Torres was unsure or did not recall which team emblem the jersey displayed, but was sure the jersey’s color was red. Minutes before, Torres had looked out the front window of the Sanchez–Carmen Torres residence and seen a man on foot wearing a Sharks jersey. On seeing Torres, the man reached for his waist as if he was carrying a gun, but he did not extract any gun and continued toward a liquor store.

DISCUSSION

I. *Instructing on Second Degree Felony-murder*

Defendant contends that his second degree murder conviction must be reversed because the trial court instructed the jurors that they could find him guilty of second degree felony murder.

The trial court instructed the jury that it could find defendant guilty of murder if the killing constituted felony-murder because it occurred during a shooting at an

inhabited dwelling (§ 246), a dangerous felony subjecting the perpetrator to liability under the second degree felony-murder rule if the act kills someone. Defendant could also, the court instructed, be guilty of murder if he killed with express malice, i.e., with the purpose of killing Sanchez (§§ 187, 188), or with implied malice. Implied malice murder occurs when an actor kills by committing an act whose natural consequences are dangerous to human life, i.e., a highly dangerous act that by its nature is likely to cause death, and commits that act knowing that it is life-endangering and does so anyway with conscious disregard for human life. (See, e.g., *People v. Chun*, *supra*, 45 Cal.4th at p. 1181.)

A. *Whether Section 246 Can Underlie Second Degree Felony-murder*

1. *Applicability of Felony-murder Rule*

Defendant contends that a finding that a criminal defendant killed by unlawfully discharging a firearm at an occupied dwelling (§ 246) cannot give rise to liability for second degree felony murder. He is correct.

In his initial briefing of this case, defendant questioned the continued viability of *People v. Hansen* (1994) 9 Cal.4th 300, which stood for the proposition that a violation of section 246 can underpin a second degree felony-murder conviction. (*Id.* at pp. 304, 309-311, 314-315.) He contended that two later cases, *People v. Robertson* (2004) 34 Cal.4th 156, and *People v. Randle* (2005) 35 Cal.4th 987, had cast doubt over *Hansen*.

In *Chun*, the California Supreme Court overruled *Hansen*. It undertook a historical review of the second degree felony-murder doctrine and the merger doctrine. It concluded, “In determining whether a crime merges, the court looks to its elements and not the facts of the case. Accordingly, if the elements of the crime have an assaultive aspect, the crime merges with the underlying homicide” (*People v. Chun*, *supra*, 45 Cal.4th at p. 1200.) The court applied this rule to section 246. “When the underlying felony is assaultive in nature, such as a violation of section 246 or 246.3, we now

conclude that the felony merges with the homicide and cannot be the basis of a felony-murder instruction.” (*Chun*, at p. 1200.)

Thus, under the law as reconsidered in *Chun*, instructing the jury on felony murder based on a violation of section 246 must now be seen as contrary to the reevaluated law.

2. *Prejudice*

After finding that the trial court in *Chun* erred in instructing on felony murder based on a violation of section 246, the court turned to the question of prejudice. The court approved, and added its own gloss to, the use of the test for prejudice articulated by Justice Scalia in his concurring opinion in *California v. Roy* (1996) 519 U.S. 2.

Justice Scalia stated: “The error in the present case can be harmless only if the jury verdict on other points effectively embraces this one or if it is impossible, upon the evidence, to have found what the verdict *did* find without finding this point as well.” (*California v. Roy*, *supra*, 519 U.S. at p. 7, quoted with approval in *People v. Chun*, *supra*, 45 Cal.4th at p. 1204.)

Using this test, *Chun* found that error in that case was harmless. Evaluating the evidence that the jury received, *Chun* said, “No juror could have found that defendant participated in this shooting, either as a shooter or as an aider and abettor, without also finding that defendant committed an act that is dangerous to life and did so knowing of the danger and with conscious disregard for life—which is a valid theory of malice. In other words, on this evidence, no juror could find felony murder without also finding conscious-disregard-for-life malice.” (*People v. Chun*, *supra*, 45 Cal.4th at p. 1205.)

Defendant argues on remand: “The upshot of this precedential history is that the People bear a heavy burden of establishing that the instant error was harmless. Indeed, the judgment must be reversed absent a showing by the People that the jury ‘actually’ [pursuant to *Yates v. Evatt* (1991) 500 U.S. 391, 404] made a finding which legally equates with express or implied malice. The People cannot satisfy their burden of persuasion here. [¶] At the outset of the analysis, it is vital to note that the jury returned a

general verdict. Thus, the record contains absolutely no evidence that the jury relied on the malice murder theory. [¶] Moreover, it is most likely that the jury used the felony-murder theory. . . .”

We understand the test to be less severe than defendant discerns. The gist of defendant’s argument is that unless a reviewing court is certain that the jury “actually” (*Yates v. Evatt, supra*, 500 U.S. at p. 404) considered a valid theory of criminal liability, the error here was prejudicial. But *California v. Roy, supra*, 519 U.S. at p. 4 (*per curiam*) rejected the view of the Court of Appeals for the Ninth Circuit, sitting en banc, that an instructional omission in these circumstances “ ‘is harmless only if review of the facts found by the jury establishes that the jury *necessarily* found the omitted element.’ ” (*Ibid.*, quoting *Roy v. Gomez* (9th Cir. 1996) 81 F.3d 863, 867.) The Ninth Circuit had reversed the United States District Court’s finding “that no rational juror could have found that Roy knew the confederate’s purpose and helped him but also found that Roy did not *intend* to help him.” (*California v. Roy, supra*, at p. 3.) *Chun* adopted a test similar to that of the federal district court, being careful, however, not to rely on notions of a “rational juror,” (*California v. Roy, supra*, at p. 3.), which would create the risk that a reviewing court is substituting itself for the trier of fact. (See *id.* at p. 7 (conc. opn. of Scalia, J.).)³

³ Moreover, *Yates v. Evatt, supra*, 500 U.S. 391, stated something less than what defendant proposes: “Once a court has made the first enquiry [*sic*] into the evidence considered by the jury, it must then weigh the probative force of that evidence as against the probative force of the presumption standing alone. To satisfy *Chapman*’s reasonable-doubt standard [*Chapman v. California* (1967) 386 U.S. 18], it will not be enough that the jury considered evidence from which it could have come to the verdict without reliance on the presumption. Rather, the issue under *Chapman* is whether the jury actually rested its verdict on evidence establishing the presumed fact beyond a reasonable doubt, independently of the presumption. Since that enquiry [*sic*] cannot be a subjective one into the jurors’ minds, a court must approach it by asking whether the force of the evidence presumably considered by the jury in accordance with the instructions is so

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As explained in *People v. Chun*, *supra*, 45 Cal.4th 1172, the evidence, the verdict, and the instructions on which the verdict depended may combine to make the instructional error harmless, regardless of what theories the jury considered, as long as, in the view of a reviewing court applying a strict beyond-a-reasonable-doubt prejudice standard, the evidence and other aspects of the verdict establish second degree murder liability under a valid theory.

In *Chun*, the trial court erroneously “permitted defendant to be convicted of murder on a felony-murder theory without requiring a finding of a valid theory of malice” (*People v. Chun*, *supra*, 45 Cal.4th at p. 1204), and *Chun* accepted for purposes of reasonable doubt analysis the defendant’s view that “jurors may simply have believed defendant was guilty of murder on the invalid felony-murder theory without ever considering a valid theory of malice.” (*Ibid.*) Given that state of affairs, the only reasonable reading of *Chun* is that an instructional error is harmless in circumstances like these if the reviewing court concludes beyond a reasonable doubt that if the jury had considered a valid theory it would have been impossible for it to acquit the defendant, regardless of whether the record shows that the jury considered the valid theory. What counts is the reviewing court’s reasonable doubt, or lack thereof, about findings the jury would have had to make based on the verdict it reached.

Thus, although defendant reminds us that the verdict was general and that there is no reason to believe that the jury considered murder based on malice, *Chun* does not demand that it have done so. Certain key language in *Chun* is condensed enough that,

overwhelming as to leave it beyond a reasonable doubt that the verdict resting on that evidence would have been the same in the absence of the presumption.” (*Id.* at pp. 404-405.) The prejudice analysis in *People v. Chun*, *supra*, 45 Cal.4th 1172, is similar to that in *Yates*.

read in isolation, defendant's interpretation is understandable.⁴ However, in context the decision does not support his interpretation.

Depending on the evidence, the verdict, and the instructions on which it in turn rested, we may, therefore, find the error here harmless despite our lack of knowledge of the basis for the verdict.

In this case, the jury was instructed that a violation of section 246 has three elements and "the People must prove the following: 1, the defendant or perpetrator willfully and maliciously shot a firearm; and 2, the defendant or perpetrator shot the firearm at an inhabited house; and 3, the defendant or perpetrator did not act in self-defense. [¶] Someone commits an act willfully when he or she does it willingly or on purpose. Someone acts maliciously when he or she intentionally does a wrongful act or . . . acts with the unlawful intent to . . . injure someone else." The jury was instructed on the definition of murder, including that a killing was murder if done with malice or through a felony inherently dangerous to human life, which included a violation of section 246. The jury was instructed on express and implied malice.

We conclude beyond a reasonable doubt that it would have been impossible for the jury not to find defendant guilty on a malice-based theory, whether or not it did so. The evidence that he acted with malice, either express or implied but necessarily one or the other, is overwhelming. The evidence is consistent with a scenario in which defendant

⁴ *Chun* stated at one point that "to find . . . error harmless, a reviewing court must conclude, beyond a reasonable doubt, that the jury based its verdict on a legally valid theory, i.e., either express or conscious-disregard-for-life [i.e., implied] malice." (*People v. Chun, supra*, 45 Cal.4th at p. 1203.) The rest of the opinion, however, makes clear that such an inquiry is but one method of finding error harmless, and that the method stated by Justice Scalia in *California v. Roy, supra*, 519 U.S. 2, as interpreted by *Chun*, is another. (*Chun, supra*, at pp. 1203, 1204-1205.) As an intermediate reviewing court we are bound by the prejudice analysis *Chun* undertook rather than by any isolated statement *Chun* may have made on its way to conducting that analysis.

shot Sanchez nonfatally in the arm as the two confronted each other at close range in front of the house, Sanchez retreated to the porch, defendant began firing in the direction of Sanchez and others present inside the house, and one of the shots struck Sanchez in the head and fatally wounded him. The evidence is not consistent with any other possible scenario. This evidence, we conclude beyond a reasonable doubt, admits of only two possibilities. The first is that defendant wounded Sanchez in the arm while the two were confronting each other on opposite sides of the perimeter fence and then deliberately gunned him down, shooting him in the head as he fled inward toward the front porch. That would be express malice murder. The only alternative is that defendant did not intend to kill Sanchez but did intend to frighten him and/or others at the residence, and did so by shooting Sanchez in the arm and then firing numerous rounds at the house as Sanchez fled toward it, knowing that Sanchez was in extreme peril and possibly also knowing, if one credits the perceptions of Mario Torres, that Torres was present inside the residence. Defendant then killed Sanchez, and doing so would constitute implied malice murder. Even if the jury did decide the case solely on the felony-murder theory, in light of its other findings that defendant killed and that he did so by using a firearm, it would have had to find, whether or not it did so, that the killing constituted murder committed by means of malice aforethought. Thus, the error was harmless, i.e., it is “ ‘clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error’ (*Neder v. United States* (1999) 527 U.S. 1, 18 . . .), which is the harmless-error inquiry under *Chapman v. California*[, *supra*,] 386 U.S. 18 (*Neder, supra*, 527 U.S. at pp. 15, 18).” (*People v. Cross* (2008) 45 Cal.4th 58, 69-70 (conc. opn. of Baxter, J.), cited with approval in *People v. Chun, supra*, 45 Cal.4th at p. 1201.)

B. *Additional Claims Related to Felony Murder*

Relying on state law and/or basic constitutional guaranties, defendant claims that (1) before the jury could find him guilty on a second degree felony-murder theory, it must find that he had a collateral purpose⁵ in firing at Sanchez's inhabited dwelling other than the purpose to kill Sanchez, yet there was no evidence of such a purpose; (2) if one or more jurors found him guilty on a second degree felony-murder theory, his punishment was arrived at in violation of the equal protection of the laws; and (3) second degree felony murder is an unconstitutional court-created crime rather than a crime defined by statute and bears with it an unconstitutional presumption of malice.

With regard to the first two arguments, we conclude that in light of *People v. Chun*, *supra*, 45 Cal.4th 1172, defendant is not entitled to relief. It is now clear, following *Chun*, that the jury should have heard not a word about second degree felony murder. It is equally clear, following *Chun*, that the jury's consideration, if any, of second degree felony murder did not result in prejudice to him. Under the evidence and the findings the jury made, there is no reasonable doubt that defendant killed Sanchez with malice aforethought.

As for defendant's challenge to the validity of criminal liability for second degree felony murder, *People v. Chun*, *supra*, 45 Cal.4th at pages 1183 and 1187-1188, rejected challenges to the rule's existence, holding only that "the felony-murder rule should not be extended beyond its required application." (*Id.* at p. 1200.)⁶

⁵ Under the law prior to its clarification in *People v. Chun*, *supra*, 45 Cal.4th 1172, for an assaultive crime that results in death, the perpetrator was not liable for second degree felony-murder unless the underlying crime was committed with a purpose independent of and collateral to causing injury. (*People v. Robertson*, *supra*, 34 Cal.4th at p. 171.)

⁶ Nor does the rule contain within it an unconstitutional presumption; rather, it contains a definitional substitution of the intent to commit the underlying felony for

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II. *Admitting Evidence of Defendant's Prior Gang-related Juvenile Misconduct*

Defendant claims that the trial court committed error under state law and violated his due process rights under the Fifth and Fourteenth Amendments to the United States Constitution by denying his motion to exclude evidence of his prior gang-related violent conduct and permitting the jury to receive that evidence.

We agree with defendant that the trial court erred in denying his motion and permitting the evidence to be introduced. We conclude, however, that no prejudice to defendant resulted from the error, whether under the *Watson* or *Chapman* standard.

A. *In Limine Trial Proceedings*

Before trial, the prosecutor advised the trial court and defense counsel that he intended to introduce evidence of defendant's prior gang-related violent conduct. Defendant had been adjudicated as a juvenile to have committed two aggravated assaults (§ 245); in one of the cases, the juvenile court also found true a section 186.22 gang enhancement allegation. The prosecutor asserted that the evidence was admissible to show defendant's intent and motive with regard to a section 186.22 gang enhancement that was alleged here. Defense counsel was willing to stipulate to the jury that the Varrio Horse Shoe gang set constituted a criminal street gang in the legal sense (§ 186.22), that

malice aforethought. *People v. Lewis* (2006) 139 Cal.App.4th 874, explains, "The . . . second degree felony-murder rule acts as a substitute for the mental component of malice. [Citations.] Under this rule, a homicide that results from the commission of a felony that is inherently dangerous to human life (other than the felonies enumerated in Penal Code section 189 to support first degree murder) is second degree murder. [Citation.] An " "inherently dangerous felony" is an offense carrying "a high probability" that death will result.' [Citation.] When the felony-murder rule applies, " "the only criminal intent required is the specific intent to commit the particular felony." [Citation.]' " (*Id.* at p. 882.) The instructions on section 246 satisfied that requirement. (*Ante*, p. 10.) There is no unconstitutional presumption but rather a definitional substitution of the intent to commit the underlying felony for malice aforethought. (Cf. *People v. Chun*, *supra*, 45 Cal.4th at p. 1184.)

the murder of Sanchez was a gang-motivated offense, and that defendant committed a number of “inflammatory predicate offenses.” Counsel drew the line only at stipulating that defendant was a member of the Varrio Horse Shoe set; that he would not do.

But defense counsel was concerned that depending on how the evidence of the predicate violent conduct and statements was introduced, there would be “substantial prejudice to my client that this is going to be improperly used as bad character evidence, as violent propensity evidence, [which is] improper. I don’t think it can be cleaned up or resolved by some limiting instruction, in essence, trying to unring the bell in that fashion, when there [are] substantial other forms of evidence that . . . would accommodate the [d]istrict [a]ttorney’s needs beyond the fact that I’m willing to stipulate to all that.” Counsel objected that the proffered evidence would be inadmissible character evidence (Evid. Code, § 1101 et seq.) and substantially more prejudicial than probative (*id.*, § 352) and that its introduction would violate defendant’s rights under the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution.

The prosecution opposed defense counsel’s stipulation offer “because the defense is that it wasn’t him.”

The trial court ruled that the evidence was admissible to show motive and intent as to the murder charge, the second degree felony-murder charge insofar as it could be used to establish the intent to fire at an inhabited dwelling (see § 246), and the gang enhancement allegation. As noted, ultimately the jury returned no finding on the gang enhancement allegation and the trial court dismissed it on the prosecution’s motion.

Later defense counsel mounted another attack on the proffered evidence, arguing in court papers that any expert testimony in which the details of documentary evidence would be recited to the jury would be inadmissible hearsay and should be excluded. The trial court implicitly denied the motion to exclude.

B. *Evidence Presented to the Jury*

The trial court qualified a San Jose police officer as an expert on Hispanic gangs, particularly the Varrio Horse Shoe set to which defendant belonged.

The prosecutor asked the officer whether he had an opinion whether defendant was a member of the Varrio Horse Shoe set. The officer testified that he thought he was. Asked to explain the basis for his opinion, the officer testified he was relying on reports and field interviews concerning violent conduct defendant or people associated with him had committed.

The officer then began to recite a litany of facts describing defendant's and his associates' violent conduct.⁷ With regard to defendant in particular, the officer read from the reports or paraphrased their contents in detail:

"On September 19th of 2000, [defendant] was stopped for truancy and he was with an individual by the name of Bobby Gonzales. Gonzales is an admitted member of Varrio Horse Shoe and Bobby Gonzales has recently been indicted for a gang-related murder that happened in '04. And—I'm sorry, '03. And that was done for the benefit of Varrio Horse Shoe gang. [¶] Q. And was that the David Street homicide? [¶] A. That's correct."

The officer continued: "On July 15th of '02 [defendant] was involved in a gang-related assault, he got in an argument, he was thirteen years old, he got in an argument with a neighborhood kid and attacked the kid with a baseball bat And hit him several times in the head. And during the altercation, [defendant] was heard by several

⁷ The officer engaged in similar recitations of the gang-related conduct or statements of Marcelino Carranza, Alejandro Mariscal, Francisco Carrillo, Carrillo's brother Cesar Diaz, Joel Gutierrez, Javier Medina, James Ortega, Fernando Morales, and Jason Tapia. The officer's testimony described these individuals' participation in one or more fights, aggravated assaults, and attempted and possibly completed murders prior to the crimes with which defendant was charged.

witnesses yelling, 'If you —' quote, 'If you mess with me, you are messing with Horse Shoe.' He also yelled out 'Horse Shoe. Horse Shoe. You're going to die, *puto*.'

"The bat was later collected and it had the letters 'VHS' written on it, which, in my opinion, stands for Varrio Horse Shoe.

"During the investigation, after he was arrested, officers from the gang investigations unit did a search of his home and found several gang-related items. They found a red T-shirt with 'SJ' on it, and 'San Jose' written on it. They found a red and white Nebraska jersey, which is a red jersey that has a[n] 'N,' just a white 'N' on it. They found a notebook with several graffiti writings such as 'VHS,' 'WSSJ,' all in different combinations, 'X4,' just a bunch of doodling, writing on it.

"During that investigation, Detective Nieves . . . from the gang investigations unit spoke with [defendant] and [defendant] said that he claims VHS because he hangs out at Horse Shoe Park and has friends that are Horse Shoe.

"The next case occurred on January 21st of '03. [Defendant] was involved in a gang-related assault at school at Crossroads School which is a continuation school. School officials reported that two Norteño students got into a fist fight on campus and one of the students was, in fact, [defendant].

"A teacher . . . told Officer Videan . . . that [defendant] has admitted to her that he was a Varrio Horse Shoe gang member. And the teacher also told Officer Videan that in her experience, [defendant] hangs out with several other Norteño gang members.

"And also at that time, [defendant] was on gang probation with the Santa Clara County Probation Department, and had a gang probation officer.

"The next incident happened six days later, 1/27/03. [Defendant] and several of his friends were walking through the parking lot of the San Jose Arena, they observed a victim they felt was a [Sureño] gang member. At that point, they started yelling, quote—all three of them started yelling '[Expletive] scrap. *Puro Norte*.' And at that time, [defendant threw] a portable [compact disc] player at the victim and all three suspects

attacked the victim with punches and kicks. And . . . [defendant] was later arrested and his probation was violated for that incident.

“On October 10th, of ’04, [defendant] was stopped in a vehicle for Vehicle Code violations . . . in the middle of the Varrio Horse Shoe neighborhood. He was with Alex Mariscal, and Cesar Diaz, who are both admitted Norteño gang members.

“[Defendant] was cited for violating his gang probation orders, which part of his orders state that he’s not allowed to hang out with other gang members, which he was doing. And he was also wearing a red shirt and a red belt, which is a direct violation of his gang probation orders. You’re not allowed to wear any gang colors if you’re on gang probation.

“On 12/12 of ’04, approximately two months later, [defendant] was contacted . . . [along] with three other Norteño gang members, again, Alejandro Mariscal, Richard Hernandez and Cesar Diaz. All subjects in that case admitted to the officer that made the stop that they are Norteño gang members and [defendant] was wearing a red belt and a red and black San Jose Sharks hat. The other individuals had gang clothing on as well.” (Italics added.)

“Q. . . . [¶] So in your opinion, based upon what you just indicated, you believe that [defendant] is a Varrio Horse Shoe gang member?

“A. Yes.”

The officer’s testimony took place on November 15, 2006. On December 8, 2006, i.e., 24 days after the jury heard the foregoing evidence, the trial court gave the jury instructions that pertained to the officer’s testimony: “You must decide whether information on which the expert relied was true and accurate.” “Having a motive may be a factor tending to show that the defendant is guilty; not having a motive may be a factor tending to show the defendant is not guilty.” “You have heard evidence that the defendant made an oral or written statement before the trial. You must decide whether or not the defendant made any of these statements in whole or in part. If you decide that the

defendant made such a statement, consider the statements along with all the other evidence in reaching your verdict.”

Having given these pertinent instructions, the trial court proceeded to instruct in detail on how to consider the officer’s testimony about defendant’s prior violent conduct, as follows:

“The People presented evidence that the defendant committed the offense of assault with a deadly weapon that was not charged in this case. You may consider this evidence only if the People have proved by a preponderance of the evidence that the defendant, in fact, committed the uncharged offense offenses.”

“If you decide that the defendant committed the uncharged offenses, you may, but are not required to consider that evidence for the limited purpose of deciding whether or not the defendant acted with a specific intent prior to prove the offense and allegations in this case, or the defendant had a motive to commit the offense alleged in this case.

“In evaluating this evidence, consider the similarity or lack of similarity between the uncharged offenses and the charged offense. Do not consider this evidence for any other purpose. Do not conclude from this evidence that the defendant has a bad character or is disposed to commit crime.

“If you conclude that the defendant committed the uncharged offenses, that conclusion is only one factor to consider along with all the other evidence. It is not sufficient, by itself, to prove that the defendant is guilty of murder or voluntary manslaughter, and/or the charged allegations. The People must still prove each element of the charge beyond a reasonable doubt.”

C. *Analysis*

1. *Error*

“On appeal, ‘an appellate court applies the abuse of discretion standard of review to any ruling by a trial court on the admissibility of evidence, including one that turns on the hearsay nature of the evidence in question.’ ” (*People v. Hovarter* (2008) 44 Cal.4th

983, 1007-1008.) Other cases already had made plain that the abuse-of-discretion standard applies to claims of improper admission of unduly prejudicial evidence under Evidence Code section 352 (*People v. Ayala* (2000) 24 Cal.4th 243, 282) and character evidence under Evidence Code section 1101 et seq. (*People v. Catlin* (2001) 26 Cal.4th 81, 120).

With regard to defendant's precise claim, we have explained that "[b]ecause an expert's need to consider extrajudicial matters and a jury's need for information sufficient to evaluate an expert opinion may conflict with an accused's interest in avoiding substantive use of unreliable hearsay, disputes in this area must generally be left to the trial court's sound judgment." (*People v. Valdez* (1997) 58 Cal.App.4th 494, 510.)

Despite the deferential nature of this standard of review, and the rule we stated in *Valdez* that "generally" (*People v. Valdez, supra*, 58 Cal.App.4th at p. 510) such questions rest within the trial court's exercise of discretion, the requirement remains that the court must exercise its discretion according to law. A court has no basis for the proper exercise of discretion if that exercise is based on a misunderstanding or misapplication of the underlying legal principles. "[A]n abuse of discretion arises if the trial court based its decision on impermissible factors [citation] or on an incorrect legal standard." (*People v. Knoller* (2007) 41 Cal.4th 139, 156.) There is a substantial risk of a violation of a criminal defendant's Sixth Amendment confrontation rights when an expert witness recites too much hearsay evidence about the defendant's prior conduct and the defendant is left unable to challenge that evidence precisely because it is hearsay, i.e., the declarant is unavailable for cross-examination. " " " "The opportunity of cross-examining . . . is denied the party as to whom the testimony is adverse.' " " " (*People v. Campos* (1995) 32 Cal.App.4th 304, 308; see *People v. Catlin, supra*, 26 Cal.4th at p. 137 [expert witness may not simply recount the details of a report]; *People v. Coleman* (1985) 38 Cal.3d 69, 92 [same].) In sum, "while an expert may give reasons on direct examination for his opinions, including the matters he considered in forming them, he may not under the

guise of reasons bring before the jury incompetent hearsay evidence.” (*Coleman*, at p. 92.)

In *People v. Valdez*, *supra*, 58 Cal.App.4th 494, we declined to apply the *Coleman* rule to the circumstances of that case. We reasoned that “the hearsay . . . did not directly name or implicate defendant in any other criminal activity” (*id.* at p. 511) and the trial court repeatedly gave limiting instructions during the expert witness’s testimony that the jury should not consider the expert witness’s hearsay evidence for its truth (*ibid.*).

Here, in contrast to *Valdez*, the officer’s testimony directly implicated defendant in other criminal activity. In these circumstances, we are not reassured that any limiting instruction could prevent the jury from giving improperly wide-ranging consideration to the testimony. “Ordinarily, the use of a limiting instruction that matters on which an expert based his opinion are admitted only to show the basis of the opinion and not for the truth of the matter cures any hearsay problem involved, but in aggravated situations, where hearsay evidence is recited in detail, a limiting instruction may not remedy the problem.” (*People v. Coleman*, *supra*, 38 Cal.3d at p. 92.) Because of the officer’s recitation of inflammatory, directly inculpatory, and factually detailed hearsay evidence—evidence that made defendant out to be, in essence, violent and wantonly prone to crime even in his early adolescence—we think this is a situation in which a limiting instruction would do little to cure the problem.

Moreover, the instructions actually given were fraught with problems. First, *People v. Gardeley* (1996) 14 Cal.4th 605 explained that “a witness’s on-the-record recitation of sources relied on for an expert opinion does not transform inadmissible matter into ‘independent proof’ of any fact.” (*Id.* at p. 619.) The trial court should have ensured that the jury did not transform the officer’s testimony into independent proof of the facts the officer recited from the reports “by an instruction that matters admitted through an expert go only to the basis of his opinion and should not be considered for their truth.” (*People v. Valdez*, *supra*, 58 Cal.App.4th at p. 511.) The limiting

instructions to which the People call our attention contain no such admonition, nor do the People contend that the court gave any such admonition.

And unlike the circumstances of *People v. Valdez*, *supra*, 58 Cal.4th at page 511, the court's instruction came 24 days after the jury heard the evidence, long after the jurors had heard the officer's testimony. The time gap would make it all the harder to get the jurors to set aside their natural inclination to accept the testimony for the truth of the contents of the reports, because the passage of so much time would have made it harder to recall what testimony any limiting instruction applied to, i.e., which testimony was to be considered for the truth of the matter asserted and which was not to be so considered.

Yet another difficulty arises from the limiting instruction itself. It referred to an uncharged offense of assault with a deadly weapon, which the jury could, under the reasonable likelihood standard applicable to such questions (*People v. Ayala*, *supra*, 24 Cal.4th at p. 289; *People v. Clair* (1992) 2 Cal.4th 629, 663), have misinterpreted as referring to defendant's killing of Sanchez and not to juvenile adjudications that occurred long before.⁸

For the foregoing reasons, we conclude that the trial court erred under state law in permitting the officer to testify in detail from reports about defendant's violent history.

As noted, defendant objected to the prosecution's plan to introduce the hearsay evidence not only on state law grounds, but also on the basis of the Fifth, Sixth and Fourteenth Amendments to the United States Constitution.⁹

⁸ We do not agree with the People that defendant forfeited any claim that the limiting instruction was inadequate by failing to insist on better instructing during trial. Defendant sought a limiting instruction in a court filing.

⁹ In his original appeal, defendant did not pursue the Sixth Amendment claim that he presented during trial. In his petition for rehearing from that appeal, defendant asked that we consider his Sixth Amendment claim, and argued that his appellate counsel had performed ineffectively (see *Strickland v. Washington* (1984) 466 U.S. 668) in failing to

continued

We discern no due process violation. Only in rare instances is a ruling on an evidentiary controversy so fundamentally unfair in its result that a federal due process violation results. In other words, “[t]he admission of evidence, even if erroneous under state law, results in a due process violation only if it makes the trial *fundamentally unfair*.” (*People v. Partida* (2005) 37 Cal.4th 428, 439.) The evidence presented here, though inflammatory and prejudicial, did not so undermine the fairness of defendant’s trial overall that we can find a due process violation and determine that defendant is entitled to relief. Aside from the presentation of this evidence, defendant has little to complain about in the prosecution’s conduct or the trial court’s presiding over the trial. Other highly inculpatory evidence against him was fairly presented. We reject defendant’s due process claim.

Defendant’s Sixth Amendment claim is on firmer constitutional ground. He urges that “[i]n *Crawford v. Washington* [(2004)] 541 U.S. 36, the Supreme Court held that the Confrontation Clause is violated when testimonial hearsay is admitted without the opportunity for cross-examination. (*Id.* at p. 59.)” *Crawford* does make that point. (*Id.* at p. 68.)

Crawford errors, however, are trial errors subject to harmless-error analysis under *Chapman v. California*, *supra*, 386 U.S. 18. (See *People v. Davis* (2009) 46 Cal.4th 539, 620.) Assuming that a Sixth Amendment violation occurred, we find that it did not prejudice defendant, for reasons we explain in the next section.

present it on appeal. We declined to grant rehearing to consider the Sixth Amendment claim. On remand, however, we see no reason not to do so. (See *Mounts v. Uyeda* (1991) 227 Cal.App.3d 111, 120-121.) We may do so “for good cause” (*id.* at p. 121) and find that it exists here.

2. *Prejudice*

Because we find state law error, we must evaluate it for prejudice under the *Watson* standard, i.e., whether a reasonable probability exists that absent the error the outcome would have been more favorable to defendant. (*People v. Watson* (1956) 46 Cal.2d 818, 836.) “Absent fundamental unfairness, state law error in admitting evidence is subject to the traditional *Watson* test: The reviewing court must ask whether it is reasonably probable the verdict would have been more favorable to the defendant absent the error.” (*People v. Partida, supra*, 37 Cal.4th at p. 439.)

We discern no such reasonable probability. The evidence that defendant murdered Sanchez was extremely strong. Marcelino Carranza testified that defendant deliberately gunned Sanchez down. Mario Torres and Juan Torres both witnessed the killing of Sanchez, and their testimony and that of other witnesses identified defendant as the probable killer based on the distinctive Jerry Rice 49ers football team jersey that defendant was wearing that evening. Defendant admitted to Alejandro Mariscal that he had “dumped” on Sanchez. Defendant was not prejudiced by the trial court’s erroneous failure to adequately control the officer’s hearsay testimony.

For the same factually grounded reasons, we find any Sixth Amendment violation harmless beyond a reasonable doubt under *Chapman v. California, supra*, 386 U.S. 18. The jury heard such strong evidence of defendant’s culpability that it is “ ‘clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error’ (*Neder v. United States*[, *supra*,] 527 U.S. [at p.] 18), which is the harmless-error inquiry under *Chapman v. California*[, *supra*,] 386 U.S. 18. (*Neder, supra*, 527 U.S. at

pp. 15, 18).” (*People v. Cross*, *supra*, 45 Cal.4th at pp. 69-70 (conc. opn. of Baxter, J.).)¹⁰

III. *Prosecutorial Misconduct*

Defendant raises three claims of misconduct by the prosecution team: one by a district attorney’s office investigator and two by the prosecutor himself. The trial court dealt with each incident properly, acting within the discretion conferred on it to address such matters, and therefore none of defendant’s claims warrants entitlement to relief.

Under federal law, “[i]mproper remarks by a prosecutor can “ ‘ “ ‘so infect [] the trial with unfairness as to make the resulting conviction a denial of due process.’ ” ’ ” (*People v. Carter* (2005) 36 Cal.4th 1114, 1204.) Under state law, “a prosecutor who uses deceptive or reprehensible methods to persuade either the court or the jury has

¹⁰ With regard to prejudice, defendant argues that this was a close case because the jury requested readbacks of various witnesses’ testimony and deliberated for four days. Defendant is correct about the proceedings. The jury’s deliberations, however, are secret and we do not know what caused it to act as it did. The jurors could, for example, have been torn about whether to find true the gang enhancement allegation. As noted, ultimately, the jury returned no finding on that allegation and the trial court dismissed it on the prosecutor’s motion. Or jurors could have had strong differences of opinion whether the murder of Sanchez was first degree or second degree.

Defendant also raises an ineffective assistance of counsel claim that is predicated on (1) his anticipation of our conclusion that he failed to preserve his claim for review and (2) an assertion that counsel performed deficiently by failing to request that the instruction regarding the officer’s testimony inform the jury that the testimony was not to be considered for the truth of defendant’s prior misconduct. We have found that he did preserve his claim, which renders moot defendant’s first point. Regarding the second, defendant is correct that the limiting instruction was inadequate (*ante*, pp. 20-21), but even if counsel was deficient for failing to request an admonition about not considering the officer’s testimony for its substantive truth, we discern no reasonable probability that the outcome would have differed had counsel made such a request, and therefore reject defendant’s ineffective assistance of counsel claim. (See *Strickland v. Washington*, *supra*, 466 U.S. at pp. 687-688, 694.)

committed misconduct, even if such action does not render the trial fundamentally unfair.” (*Ibid.*)

There is no requirement that “a prosecutor must act with a culpable state of mind. A more apt description of the transgression is prosecutorial error.” (*People v. Hill* (1998) 17 Cal.4th 800, 823, fn. 1.)

“Misconduct that infringes upon a defendant’s constitutional rights mandates reversal of the conviction unless the reviewing court determines beyond a reasonable doubt that it did not affect the jury’s verdict. [Citations.] A violation of state law . . . is cause for reversal [only] when it is reasonably probable that a result more favorable to the defendant would have occurred had the district attorney refrained from the untoward comment. [Citations.] In either case, only misconduct that prejudices a defendant requires reversal [citation], and a timely admonition from the court generally cures any harm.” (*People v. Pigage* (2003) 112 Cal.App.4th 1359, 1375.)

It appears that misconduct by any member of the prosecution team, including in the form of independent action taken by an investigator for the district attorney’s office, is imputed to the prosecutor under the general rubric of prosecution misconduct. (*In re Martin* (1987) 44 Cal.3d 1, 20, 33-35, 40, 46, 50.)

A. *Investigator’s Demand That Defense Counsel Wait for Prosecutor Before Speaking With Witness in Courthouse Hallway*

Defendant claims that the prosecutor’s office committed misconduct when the district attorney’s investigator interrupted defense counsel’s attempt to speak with a witness and demanded that counsel wait until the prosecutor could arrive.

The incident was discussed in a hearing outside the jury’s presence. Defense counsel explained that during the lunch recess he saw Carmen Torres outside the courtroom and wanted to ask her a question. Torres was in the midst of testifying. As counsel asked Torres if he could ask her a question, the investigator interceded, displaying her badge and telling counsel he would have to wait until the prosecutor could

arrive. Counsel told the investigator he had no obligation to wait, turned to Torres, and asked her if he could ask her a question. Torres declined.

When the prosecutor learned about the incident, he told Torres she had the right to speak to defense counsel if she wanted to, but Torres said she did not want to do so.

When the trial court learned of the incident, it directed the prosecutor to admonish his office's investigator not to repeat the conduct and to inform Torres that she could talk to defense counsel if she wished. It is unclear from the record whether the prosecutor gave this information to Torres following the court's action, had already done so on his own initiative, or gave Torres the information on separate occasions for both reasons.

Defendant's claim is foreclosed by *People v. Panah* (2005) 35 Cal.4th 395, 458, which rejected a prosecutorial misconduct claim under similar circumstances. In *Panah* as here, "the prosecution provided defendant access to the witness but she refused to speak to the defense. Her refusal does not constitute prosecutorial misconduct." (*Ibid.*)

B. *Remarks at Closing Argument*

Defendant claims that the prosecutor committed misconduct twice during closing argument. Any harm, however, was cured by the trial court's admonition to the jurors to disregard the remarks.

1. *Comment on Future Dangerousness*

The prosecutor argued that if the jury found defendant not guilty he would be free to "kill again." Defense counsel objected and the trial court admonished the jury to disregard the remark. Defendant offers no reason that could lead us to conclude the jurors failed to follow that instruction. As noted, "a timely admonition from the court generally cures any harm." (*People v. Pigage, supra*, 112 Cal.App.4th at p. 1375.) On this record, we see no reason not to apply this rule.

2. *Custody Status of Carrillo With Other Norteños*

The jury heard that Francisco Carrillo was in custody in the company of other Norteños when he testified at a preliminary hearing. The defense argued that Carrillo, the

real killer, was under Norteño gang protection in jail and that the Norteños were framing defendant, even though he himself was a Norteño. The prosecutor argued in response that “people who are convicted of or are charged with [Carrillo’s crime] are actually held in protective custody with the [Sureños], away from all the Norteños.” Defense counsel objected on the ground that the prosecutor was arguing facts not in evidence. The trial court sustained the objection and admonished the jurors to disregard the remark.

Again, defendant offers no reason that could lead us to conclude the jurors failed to follow that instruction. On this record, we see no reason not to apply the rule that “a timely admonition from the court generally cures any harm.” (*People v. Pigage, supra*, 112 Cal.App.4th at p. 1375.)

V. *Cumulative Error*

Defendant claims that his due process right to a fair trial under the Fifth and Fourteenth Amendments to the United States Constitution was violated because of the cumulative effect of the trial court’s error and prosecution misconduct.

A claim of cumulative error is in essence a due process claim and is often presented as such (see, e.g., *People v. Rogers* (2006) 39 Cal.4th 826, 911). “The ‘litmus test’ for cumulative error ‘is whether defendant received due process and a fair trial.’ ” (*People v. Cuccia* (2002) 97 Cal.App.4th 785, 795.)

“ ‘[A] series of trial errors, though independently harmless, may in some circumstances rise by accretion to the level of reversible and prejudicial error.’ [Citation.] The few errors that occurred during defendant’s trial were harmless, whether considered individually or collectively. Defendant was entitled to a fair trial but not a perfect one.” (*People v. Cunningham* (2001) 25 Cal.4th 926, 1009.) Taking all of defendant’s claims into account, we are satisfied that he received a fair trial and we deny his claim.

DISPOSITION

The judgment is affirmed.

Duffy, J.

WE CONCUR:

Mihara, Acting P. J.

McAdams, J.